(31358)

Supreme Court of the United States

OCTOBER TERM, 1925
(No. 635)

No. 185 on the Summary Docket
OCTOBER TERM, 1926

WILL MOORE,
Insurance Commissioner of the State of Oregon,
Appellant,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, HARTFORD ACCIDENT AND INDEMNITY COMPANY and NATIONAL SURETY COMPANY, *Appellees.*

Appeal from the District Court of the United States for the District of Oregon.

Brief of Appellees

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SUBJECT INDEX

Table of Cases Cited

Textbooks Cited

Statutes Cited

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Brief of Appellees

Statement of the Case

On March 26, 1924, appellees filed in the District Court of the United States for the District of Oregon, their bill of complaint (R. 1), in which it is alleged that they are foreign corporations, being incorporated under the laws of states other than Ore-

gon, and "legally engaged in the business of insurance as defined by Section 6322, et seq., Oregon Laws, and commonly called the Insurance Code of said state * * * ; that prior to engaging in said business in said state of Oregon, and more than three years prior to the institution of this suit, each of said plaintiffs had duly and legally qualified to transact such business as a foreign insurance corporation."

Following the above is a statement that the various steps and proceedings were taken as required by Oregon Laws to qualify plaintiffs to engage in the insurance business in Oregon as foreign corporations.

It is further alleged in complaint that on May 25, 1921, the then Insurance Commissioner of Oregon issued to appellees his certificate of approval and authorization of the automobile confiscation coverage described in complaint (R. 5).

On November 20, 1923, appellant, the present Commissioner, issued his "Department Bulletin No. 25," in which he attempted to cancel and annul the authorization and license issued to appellees by his predecessor (R. 7), on the ground therein stated, that the coverage was "void as against public policy."

The complaint further alleges that appellant's action was arbitrary, unauthorized and an assumption of non-existent authority, and will jeopardize appellees' confiscation bond, underwriting business, and injuriously affect their standing and reliability, and entirely destroy their general business and good will in said state, thereby causing inestimable and irreparable damage and depriving them of their

property without due process of law, in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States (R. 8).

There was no prayer for an injunction against the enforcement, operation or execution of any statute upon the ground of the unconstitutionality of such statute or otherwise.

On April 12, 1924, appellant filed a motion to dismiss complaint (R. 10).

On January 12, 1925, the Court dismissed the above motion, and rendered its written opinion therein (R. 10), in which the Court held that appellees were duly licensed under the Oregon Laws as foreign insurance companies (R. 11), and that "they do not insure against the actual results of a confiscation for a violation of the law, or the penalty inflicted or the damages sustained by the culprit. They cover nothing but the loss of property of the insured, like fire, theft or embezzlement insurance, the last two of which necessarily involve criminal acts of the person committing the same, although not the person injured. The vendee is not a party to the contract, and is no more protected by it than is a thief who steals an automobile covered by theft insurance" (R. 13).

On January 16, 1925, appellant filed his answer to the complaint (R. 14).

On January 22, 1925, appellees filed a motion to strike practically all of the answer (R. 19).

On February 5, 1925, the Court sustained appellees' motion to strike (R. 21).

On May 18, 1925, a final decree was entered on stipulation of appellant that he declined to further answer (R. 22).

Under Section 6623, Oregon Laws, the Insurance Commissioner is authorized to enforce the laws, and to issue departmental rules and orders necessary to secure the enforcement of such laws, but he is not vested with power to deny citizens their rights or privileges under the law.

Points and Authorities

I.

JURISDICTION.

An appeal to the Supreme Court of the United States does not lie from the decree of the District Court in this suit.

This is not a proceeding to suspend the enforcement of the statute of a state, or of an order made by an administrative board or commission created by and "acting under the statute of a state," covered by Sec. 238 of the Judicial Code.

Act of Feb. 13, 1925, 43 Stat. c. 229, p. 938. (Sec. 238 Judicial Code);

Act of Feb. 13, 1925, 43 Stat. c. 229, p. 938. (Sec. 266 Judicial Code.)

II.

This is not a suit for an injunction suspending or restraining the enforcement, operation or execution of any statute of a state, or restraining the action of any officer of such state in the enforcement or execution of any statute, or in the enforcement or

execution of any order made by any administrative board or commission acting under and pursuant to the statutes of such state, nor is it a proceeding attacking the constitutionality of any such statute, as provided for in Section 266 of the Judicial Code.

It did not require the presence of three judges.

Act of March 4, 1913, 37 Stat., p. 1013, c. 160, as amended by the Act of February 13, 1925, 43 Stat., p. 938, c. 229 (Sec. 266 Judicial Code);

In re Buder, 46 S. Ct. (Advance Opinions No. 17) 557, 558, 70 L. Ed. (Advance Opinions No. 16) 634, 635, 636.

Michigan State Telephone Co. v. O'Dell, et al., 283 Fed. 139.

Likins v. Chesapeake & Ohio Railway Company, 209 Fed. 573, 126 C. C. A. 395.

Live Oaks Water Users' Association, et al., v. Railroad Commission of the State of California, 46 S. Ct. (Advance Opinions No. 6), 149, 70 L. Ed. (Advance Opinions No. 7), 167, 168.

The Commissioner had no power under the Oregon statute to issue said Order or Department Bulletin No. 25.

Oregon Laws, Sec. 6324, 6326.

III.

The contracts of insurance in this case are not in contravention of public policy.

Owens v. Henderson Brewing Company, 215 S. W. Rep. 90.

Stephens v. Southern Pacific Company, 41 Pac. 783 (29 L. R. A. 751).

Taxicab Motor Company vs. Pacific Coast Casualty Company, 132 Pac. 393.

Berry on Automobiles, 3 Ed., Sec. 1617, p. 1435.

4th Joyce Law of Insurance, Sec. 2531b, p. 4217.

(Note: 6 A. L. R. 377.)

Fidelity and Deposit Company of Maryland, et al., v. Moore, Insurance Commissioner of Oregon, 3 Fed. Rep. (2nd Series) 652.

Fidelity and Casualty Co. v. Eikoff, 30 L. R. A. 586.

Midland Motor Co. v. Norwich Union Fire Insurance Society, et al., 72 Mont. 583, 234 Pac. 482.

IV.

The policies of insurance issued by appellees were fully authorized under the Oregon statutes.

See Oregon Laws, Sec. 6322, 6328, 6337, 6338, 6343.

Argument

Under Sections 238 and 266 of the Judicial Code and the decisions hereinbefore cited under "Points and Authorities," it is believed that appellant has not the right to have the decree of the District Court reviewed in this Court. It is in no way sought in this proceeding to suspend the enforcement of any state statute or order made by any administrative board or commission created by and "acting under the statute of a state." Appellees respectfully suggest that the acts of the Insurance Commissioner of

Oregon complained of were wholly arbitrary and not authorized by any law or statute.

That portion of Section 266 of the Judicial Code applicable to this question is in the following language: "No interlocutory injunctions suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court or by any District Court of the United States, or by any judge thereof, or by any Circuit Judge acting as District judge, upon the ground of the unconstitutionality of such statute, etc."

This suit is not instituted for any of said purposes. No question is raised by appellees as to the constitutionality of any statute. The complaint does not seek to restrain the action of any officer in the enforcement or execution of any statute or in the enforcement or execution of any order made by a commissioner "acting under or pursuant to the statutes of such state." Under no statute of Oregon was appellant vested with power arbitrarily to cancel or withdraw the license issued by his predecessor after appellees had fully complied and continued to comply with all of the provisions of Oregon statutes qualifying and authorizing them to transact the kind of insurance business covered by the license granted.

The Insurance Commissioner of Oregon, under Section 6324, Oregon Laws, is charged with the execution of the laws and not with the power of enacting laws for the state. He is, under Section 6326, Oregon Laws, vested with the "Power to enforce all of the laws of the state relating to insurance," and he shall "issue such department rules, instructions and orders as he may deem necessary to secure the enforcement of the provisions of this act." In the performance of his duty, however, he is not vested with power to set aside the laws of the state or arbitrarily to deprive citizens of their rights or protection thereunder. He is further required, under the terms of the last section, to issue the certificates provided for by the act.

The Insurance Contracts in Question Are Not Void as Against Public Policy.

It is said on page 28 of appellant's brief that public policy will not permit the enforcement of a contract which offers a temptation to violate the law and which undertakes to indemnify another against the consequences of an act which is illegal. Our answer to this statement is that the insurance issued by appellees to automobile dealers in no manner offers any temptation to violate the law. No possible advantage could flow to either the insurer or the assured in acts which would or might result in the confiscation of the assured's property. The contract in no sense undertakes to indemnify another against the consequences of any act committed by him which is illegal. Under the very terms of the contract, it is provided that if the assured is a party to the violation of the prohibition laws, the policy of insurance becomes void as a result of such act.

It is provided in the contract of insurance that the liability thereunder shall in no case exceed the actual cash value of the automobile at the time of the confiscation and not more than two-thirds of the purchase price thereof, nor more than the amount of the unpaid installments on the purchase price thereof, payable by the vendee, exclusive of any interest thereon (R. 3).

It is further stated in page 39 of appellant's brief that any agreement "which involves the doing of an act which is positively prohibited by the rules of the common law or by statute is illegal and void." We will have to concede the correctness of this statement. There is, however, involved in this suit, no agreement for the violation of any law.

It seems to us that it is, and ought to be, as lawful for a dealer in automobiles to protect himself by insurance against loss through the illegal acts of purchasers from the dealers as it is for banks and employers to insure themselves against loss by theft, embezzlement, misapplication of funds, etc. In the Montana case of *Midland Motor Company versus Norwich Union Fire Insurance Society, Limited, et al.*, 72 Montana, 583; 234 Pacific 482 (quoted from on page 41 of appellant's brief), the rule is clearly stated as follows: "It is not questioned in this case but that it is competent and legal to insure the vendor of an automobile against the confiscation thereof for a violation of the National Prohibition Act by a person other than the vendor." The trial court in the present case, after a careful review of the authorities, arrived at the same conclusion, and it seems to us that any other conclusion would defeat rather than promote public policy.

On page 44 of appellant's brief there are quotations from 6 R. C. L. 757 and 31 C. J., page 425, Section 17b. The portions of these authorities here quoted apply to contracts "having for their subject matter" an interference with the due enforcement of law, and contracts by which the party undertakes "to indemnify the other against the consequences of an act which is illegal." The contracts issued by appellees have no such purpose or effect; they neither have for their subject matter an interference with the enforcement of law, nor to indemnify the assured against the consequence of any act committed by him which is illegal.

From the statements contained on page 45 of appellant's brief, it seems to be his idea that it would promote the public welfare and conform to the rule of public policy to make it impossible to dispose of motor vehicles under partial payment contracts. In this connection we call the Court's attention to the fact that automobile production is the largest manufacturing industry in the United States.

It is stated in the Commerce Year Book for 1925, published by the United States Department of Commerce, at pages 394 and 395, that—

> "The automobile industry stands first among the manufacturing industries in value of products. The value of its output (United States only) in 1925, according to the preliminary figures of the last biennial census, was $3,372,000,000.00."

We are not possessed of accurate knowledge as to the proportion of automobile sales which are covered by conditional sales contracts, but we feel safe

in making the statement that more than ninety per cent of the automobile sales business in the United States is effected through conditional sales contracts and that the adoption of the narrow application of the rule of public policy suggested by appellant, would defeat the very purpose of the rule.

Every statement contained in paragraphs III and IV (pages 47 to 59, inclusive, of appellant's brief) is sufficiently answered by mere reference to the allegations contained in the complaint (R. 1) and the provisions of the pertinent sections and subdivisions thereof of Oregon Laws which are quoted below.

Section 6322, being a part of the Oregon Insurance Code, defines the general scope and meaning of the term "insurance," as contemplated and covered by the provisions of the code, as follows:

> "Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event, whereby the insured or his beneficiary suffers loss or injury."

Section 6328, Oregon Laws, covers the issuance of licenses to foreign insurance companies, the provisions of which have been fully complied with as stated in complaint.

Section 6337, Oregon Laws (subdivision 1), provides that "a company, association, partnership or individual engaged in the business of insurance or suretyship, or of guaranteeing against liability, loss or damage, or of entering into contracts substantially

amounting to insurance, shall be deemed an insurance company," etc.

Section 6338, Oregon Laws (subdivision 1):

> "Any insurance company, which has qualified to transact its appropriate business in this state, may be licensed to transact any of the classes of insurance defined in this section or permitted under the laws of this state, and which it may transact under its charter or articles of incorporation and the laws of the state in which it has its home office or United States Department office."

Section 6343, Oregon Laws:

> "Insurance companies may be organized in the state, and foreign and alien companies may be granted permission, to transact the business of accident, health, liability, elevator, plate glass, steam boiler and fly wheel, burglary and theft, sprinkler, leakage, automobile and teams property damage, credit, title, fidelity and surety, live stock, workmen's collective insurance and *insurance against any other loss or casualty,* which may lawfully be the subject of insurance and for which no other provision is made by the laws of the state," etc.

At the outset, we feel that the Court will weigh this question with a due regard to public interest and welfare, and that it will not overlook the fact that the manufacture and distribution of automobiles have come to be, within recent years, one of the very large industries within the United States. In the convenient distribution of automobiles, it is essential that sales establishments shall be main-

tained in the hundreds of urban communities throughout the country. The distributors, as a rule, do not possess sufficient financial strength to conduct an automobile sales establishment without being enabled to discount the notes and conditional sales contracts with banks or automobile financing corporations. The purchasers of this class of paper, or those who lend money upon the same, demand that these notes and contracts be made secure against the contingencies of loss by accident, fire, theft and confiscation.

The rule, therefore, of public policy should not be so applied or construed as to unnecessarily injure or interfere with the convenient and economical distribution of a present day American life necessity.

Broadly defined, "public policy" is that principle which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, and the Courts universally hold in applying this rule, that extreme caution should be exercised, to the end that more harm than good may not result from the application of the rule.

This class of insurance is required, not for the purpose of encouraging or abetting the carrying of intoxicating liquors, but to preserve to the vendor his security for the unpaid portion of the purchase price of the machine sold, and it is in the same category with fire, embezzlement and burglary protection. While it is true that in some isolated instances a vendor might connive at the destruction by fire, or the embezzlement of an automobile, or its use in transportation of intoxicating liquors, yet it must be

remembered that the contract provides that the vendor is insured only against

> "All direct loss or damage which he may sustain caused by the confiscation of said automobile by reason of the violation (*otherwise than by said vendor*) of the provisions of the national prohibition act";

and, further, that

> "It is warranted that the vendor has had no notice or knowledge that the vendee is unreliale, dishonest or unworthy of confidence."

In view of the extent and nature of the transactions in this country, involving conditional automobiles sales contracts, it is in the interest of the public, rather than opposed thereto, that the seller shall have the benefit of insurance against each and all of the causes of loss above enumerated, equally so with relation to loss through the illegal act of the transportation of intoxicating liquors by the person to whom the dealer gives a conditional contract of sale, as against loss by fire, theft or other of the possible causes of loss. It will not be contended that contracts insuring against embezzlement and theft are contrary to public policy. Such contracts have long been issued and regularly upheld by the Courts, and it seems to us that the contract insuring against the unlawful act of the purchaser of an automobile from the insured is not more in conflict with the rule of public policy than a contract of insurance against the unlawful act of a thief in stealing an automobile from the insured. It is true that many insurance contracts necessarily involve, to a greater or less extent, questions of public policy, but in construing these contracts the Courts give considera-

tion to the question as to what will be in the best interest of the public.

Instances of violation of the prohibition laws by the purchasers of automobiles, having confiscation coverage, constitute an extremely small percentage of the many automobile sales contracts carrying this class of coverage. It seems to be erroneonsly assumed by appellant that it is the desire, or in the interest of the insurer and the insured, that automobiles on which confiscation coverage is carried shall engage in the unlawful business of transportation of intoxicating liquors in violation of law. Neither the insurance company nor the seller can be said to be in any measure parties to or promoters of this class of violation of law.

The contract of insurance in no way undertakes to indemnify the insuring vendor of the automobile against the consequences of a violation of any law by himself, or by any one else with his consent or permission, in any greater degree than a contract to indemnify against loss by embezzlement, theft, or burglary. In the first case, he is insured against loss by reason of the violation of the prohibition or revenue laws. In the second case, he is insured against loss by reason of a violation of the penal statutes relating to embezzlement or theft of his property. In either case, it is only the loss of property against which he is indemnified.

In neither case is he indemnified against any unlawful act on his part. In neither case is he a party to the violation. Such violations would be against the interest of the insured. He cannot, therefore, be said to connive at, aid in, or even wish that the law should be violated. So far as the parties to the con-

tract are concerned, we repeat, then, that they are guilty of no design which has for its purpose or aim a violation of law, and that the writing of policies of this character are as justifiable, lawful and necessary as the issuance of policies against other classes of loss in conducting any other legitimate business.

The interest of both the insurer and the insured is involved in discouraging and preventing, if possible, the violation of the law. It cannot be successfully urged against this confiscation coverage that its purpose is unlawful or that it contemplates the commission of any offense against either state or federal prohibition or internal revenue laws, or that either the insurer or insured, at the time of the making of such contracts, had in mind else than the protection of the security and the preservation of the law, and, unless the contract manifestly discloses such unlawful purposes, it is not contrary to public policy.

This principle is in keeping with the great weight of authority and is well stated in the case of *Owens vs. Henderson Brewing Company,* decided by the Supreme Court of Kentucky, October 1, 1919, where it is said, among other things:

> "Courts are very unwilling to ascribe to a contract an illegal or unlawful purpose, and will not do so unless such purpose is manifest. The construction which harmonizes with the law and good morals will be given to the contract."

215 S. W. Rep., page 90.
6 R. C. L., Section 135, page 730.

See also *Stephens vs. Southern Pacific Company*

Cal.), 41 Pac. 783 (29 L. R. A. 751), in which the law of public policy is in part defined as follows:

"The foregoing line of reasoning is ingenious, but we cannot endorse it as sound in law. It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached before, if respondents' position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts, recognizing this, have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound policy, the court will never so declare. 'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' *Richmond v. Dubuque & S. C. R. Co.*, 26 Iowa, 191. "Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malem in se*, to be void, as contravening the policy of the statute, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.' *Kellog v. Larkin*, 3 Pinney, 125, 56 Am. Dec. 164. 'No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled policy of this state, or injurious

> to the morals of its people'. *Swann v. Swann,* 21 Fed. Rep. 299."

In an action to enforce the insurance contract covering damage to an automobile, the defendant company sought to escape liability on the ground that at the time of the accident the automobile was being driven by a boy under eighteen years of age, in violation of law. In this case, the defendant relied upon the case of *Mullen vs. Hoffman,* 174 U. S. 639, and the case of *Levy vs. Kansas City,* 168 Fed. 524. The Court, however, said:

> "I do not question the principle announced in those cases. Neither do I question the proposition that, if the insurance policy in question undertook by its express terms to indemnify the plaintiff against damages resulting to him because of *his* violation of a criminal statute, he could not recover."

The presumption is that an agreement that is not *malum in se* is a valid exercise of the constitutional right which one citizen has to contract with another, and upon him who suggests that the engagement is void, is cast the onus of showing that the same is, in fact, not theoretically, against public policy, or injurious to public morals.

The policy of the law is to uphold contracts, not to destroy them; and if this principle is not strictly adhered to, then nearly every species of insurance contract may be voided upon mere supposition that its execution may result in a violation of law.

These confiscation bonds promise no protection to the offender and afford him no advantage over any other lawbreaker. They merely engage that if

perchance the purchaser of the automobile, without participation on the part of the vendor, violates the law in the use of the vehicle, and the same is seized by the authorities, and is not returned to the vendor, the insurance company shall reimburse the vendor in a sum not to exceed the actual cash value of the confiscated automobile or the amount of the total unpaid installments due on the contract.

In *Taxicab Motor Company vs. Pacific Coast Casualty Company*, 132 Pacific 393, the Court discusses the rule of public policy as follows:

> "The only question that is open to the appellant, therefore, is whether such a contract is void as against public policy. Answering this question we are clear that the contract is not so void. Undoubtedly a contract indemnifying another against the consequences arising from wilful violations of a statute, *or from the commissions of crime generally, committed by the assured himself, is void for the reasons given, but one may lawfully insure another against the consequences of such acts committed by his servants or employes, if such acts are not directed or participated in by the assured.* If this were not so, bonds taken to insure against the misappropriation or embezzlement of funds by employes generally would be void, and we need not go beyond our own decisions to find authority to sustain obligations of this character."

The quotation as given above is accepted by text writers on insurance as correctly stating the law. (Berry, Automobiles, 3d Ed., Section 1617, p. 1435; 4th Joyce, Law of Insurance, Sec. 2531b, p. 4217; note, 6 A. L. R. 377.)

The distinction between insurance against wilful, unlawful acts of the assured himself, as contrasted with insurance against the acts of third parties has evidently appeared so obvious that only in a very few instances has attack been made against policies of the latter class on the ground that such policies were contrary to public policy. In each instance the contention was denied.

Fidelity & Casualty Co. vs. Eikoff, 30 L. R. A. 586;

4th Joyce Law of Insurance, Sec. 2531b.

Larceny, burglary and theft policies are conceded as serving lawful and useful purposes. It is said in the note to 46 L. R. A. (N. S.) 562:

> "With the enlarging scope of the insurance business and its branches, policies indemnifying against losses by burglary, theft and larceny have become common, and such policies are upheld and given effect by all courts."

In the case of *Gould vs. Brock,* 69 Atl. 1122, the court, in commenting on the changing views as to the scope of insurance, remarks:

> "There was a time when all insurance, and especially life, was looked upon with suspicion and disfavor, but it was only because regarded as a species of wagering contract. That time has long gone by. And, with intelligent study of political economy bringing the recognition of the fact that even the most sporadic occurrences are subject to at least an approximate law of averages, the insurance against loss from any such occurrence has been recognized as a legitimate subject of protection to the individual by a guaranty of indemnity from some party un-

dertaking to distribute and divide the loss among a number of others for a premium giving them a prospect of profit."

The contention that the confiscation bond is contrary to public policy takes no account of the constant expansion of modern business interests and the need for protection thereof.

There is no form of insurance that can be restricted to the use of upright and honorable men. Crooks and criminals will, upon occasion, be able to use it for unlawful purposes. Newspapers frequently carry reports of attempts at arson to collect fire insurance; the commission of murders to secure the life insurance of the victim; scuttling of ships to realize on the marine insurance. It would hardly be said, however, because of these instances that such insurance is void by reason of being in contravention of public policy.

In the proper application of the public policy rule, with respect to the carrying on of the automobile business, it seems to us that these confiscation contracts have a tendency to benefit, rather than to injure the public.

It is said that the duty is imposed upon the insurer to exercise care to see that the automobile is not used in violation of the laws, and it is urged that the insurance contract under consideration tends to relieve the plaintiff from that duty. It is respectfully submitted that it is humanly impossible for dealers in automobiles to conduct their business in such way as to confine their sales solely to law-abiding citizens. Without being in any manner guilty of negligence or indifference as to the character of

the persons to whom sales are made, it is inevitable in the very nature of the business itself that in a few isolated instances there may be violations of the prohibition laws, by means of the use of the automobile sold by the dealer. It is reasonable to assume, however, that the dealer would be more cautious in the protection of his own interest under a conditional sales contract than in case of a cash sale. It would be against his interest to sell an automobile upon partial payment to one who is likely to violate the law in such way that the automobile may become involved in confiscation proceedings.

Policies against loss through embezzelment by employes, and through loss by burglaries and theft, exclusively apply to and cover losses incident to violations of law. If it is proper to insure against loss by reason of the negligence of the insured, if it is lawful to insure the employer against embezzlement by his employes, if it is lawful to insure against loss through burglary, then, it seems to us, that it is not unlawful for the automobile dealer to insure against the possible loss through the unlawful act of a purchaser, concerning whom the assured warrants that he has no notice or knowledge of unreliability, dishonesty, or unworthiness of confidence.

It has been suggested that confiscation coverage would encourage attempts to defeat the purposes of the prohibition laws. It is not improper that the insurer, as well as the insured, shall exercise the right of lawfully defending their interests in a proceeding for the confiscation of the property in which they have an interest. There is, however, nothing in the contract which suggests that they would resort to any illegal methods in the protection of these in-

terests. Even in bonds upon appeal in criminal cases, the parties are expected to use every legitimate means to accomplish the reversal of the judgment, and such bonds are required by law.

The coverages for embezzlement, theft or burglary are not regarded as being invalid upon the theory that they either encourage the commission of crimes, or prevent the punishment therefor, nor should confiscation insurance, which is of the same fundamental character, be subject to any different rule.

The only purpose and design of the contract is to protect the seller against the possible loss by the illegal use of the automobile sold, involving a risk over which the very nature of the business suggests the impossibility of the seller being able to otherwise protect himself. Particularly is this true with respect to the necessity of the dealer discounting his partial sales contracts, or notes, in order that he may keep himself sufficiently financed to carry on an automobile sales business. There is nothing in the nature of the transaction which properly suggests the purpose or design on the part of the insurer or the insured to aid or promote transgressions of law. On the other hand, every consideration of interest of both the insurer and insured is involved in the desire on their part that there shall be no violation of law.

In the written opinion delivered by the Trial Court in the case covered by this appeal, District Judge Bean said:

> "The controlling question, therefore, in the case is whether the confiscation coverage contracts in question are against public policy and void. The courts always proceed with caution

when invoked to declare a contract void on the ground of public policy and will not do so unless such purpose is manifest. It is presumed that parties intend legal contracts and contemplate no violation of the law where the subject matter thereof is not forbidden by law or the declared policy of the state. The power of courts to declare a contract void because in contravention of public policy is a very delicate and undefined power and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. (*Stephens et al., vs. S. P.,* 41 Pac. 783.) It is not easy to give a precise definition of public policy. It is said to be that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good, as declared by the law and decisions of the courts. (*Spaulding vs. Maillet,* 188 Pac., 377.) Any contract which has for its manifest purpose or tendency to interfere with the due enforcement of law, or which offers a temptation to violate the law, or which undertakes to indemnify another against the consequences of an act which is illegal is void. (6 R. C., p. 757; 14 R. C., p. 887; 31 C. J., p. 425; *Cooper vs. N. P.,* 212 Fed. 533.) If the purpose and intent of the contracts involved in this case is to indemnify the assured against the violation of law by himself or with his permission or to hamper or impede the enforcement of the law against the actual offender, they would unquestionably be against public policy and void. But they do not undertake to indemnify the vendor of an automobile against the consequences of a violation of law by himself, or by any one else by his consent or permission. Indeed, it is provided that in the latter event the contract shall not be effective, nor do they interfere with nor impede the due enforcement of

the law against the offender, or confer protection on or indemnity to him. The purpose and effect is not to protect a violator of law, but to guarantee to the vendor his security if the law should be violated by his vendee without his knowledge or consent. It cannot be distinguished in principle it seems to me, from insurance issued to employers indemnifying them against loss or damage on account of the defalcation or embezzlement of their employes, and such contracts are common and have never been considered void on the ground of public policy so far as I know.

It may be said that the contracts would have a tendency to make the vendor of an automobile negligent in investigating or inquiring as to the character of his vendee, or the business in which he proposed to engage, but the same may be said with reference to fire insurance on buildings occupied by tenants, or contracts to reimburse the insured against liability to those who suffer from the negligence of their employes. Because a temptation to negligence may probably result from an insurance policy it cannot be said that the insurance policy necessarily begets negligence. (*Cal. Ins. Co. vs. Union Compress Co.*, 133 U. S. 387; 6 R. C. L. 730.)

It is argued that the lien of a vendor of an automobile sold on credit is fully protected from loss by reason of a violation by his vendee of the state and federal prohibition laws. This is not so clear. It is true that under Section 11, Chapter 29, Laws of Oregon, 1923, and the Section 26 of the National Prohibition Act (41 St. at L. 315), the interest of an innocent vendor of an automobile who retains title or a mortgage thereon to secure the unpaid purchase price is not forfeited by the seizure of the vehicle for a violation by his vendee of the prohibition law

(*Oakland Motor Co. vs. U. S.*, 295 Fed. 626), but whether the costs and expenses of the seizure are a prior lien on the vehicle in case its value is not equal to the lien of the vendor is an unsettled question.

But however that may be, by the Act of Congress of November 23, 1921, (St. at L. 222), all laws in regard to the manufacture, taxation and traffic in intoxicating liquor, and all penalties for the violation of such laws that were in force when the National Prohibition Act was enacted are continued in force and effect (*U. S. vs. Stafoff*, 260 U. S. 477), and under those laws a vehicle used by one who has it on credit from the owner in the removal or concealment of intoxicating liquors with intent to defraud the United States of the tax thereon is subject to seizure and forfeiture, although the owner or lien holder is without notice of and not a party to the forbidden use. (*Goldsmith-Grant Co. vs. U. S.*, 254 U. S. 505.) The interest of a vendor in an automobile sold on credit is, therefore, not fully protected by the provisions of the state and federal prohibition laws referred to.

In my judgment the confiscation bonds proposed to be issued by the plaintiffs do not contravene public policy. They are not forbidden by law and do not undertake to indemnify the assured against damages resulting to him because of his violation of the law, or that of any one else with his knowledge or permission. Nor do they interfere in the slightest degree with the prosecution of offenders against prohibition or other laws. They promise no protection to the offender and afford him no advantage over other law breakers. They are merely agreements on the part of the insurance companies that if perchance the purchaser of an automobile should violate the law and the vehicle be

seized by the authorities and not returned to the vendor it will reimburse the vendor for his loss or damage on account of such seizure in a sum not exceeding the balance unpaid on the purchase price. By the express terms of the contracts the insured warrants that he has no notice or knowledge that his vendee is unreliable, dishonest or unworthy of confidence, and agrees that the policy shall not apply or be in force in case of a violation of the law by himself or with his knowledge or permission.

They do not insure against the actual results of a confiscation for a violation of the law, or the penalty inflicted or the damages sustained by the culprit. They cover nothing but the loss of the property of the insured, like fire, theft or embezzlement insurance, the last two of which necessarily involve criminal acts of the person committing the same, although not the person insured. The vendee is not a party to the contract, and is no more protected by it than is a thief who steals an automobile covered by theft insurance."

We earnestly urge that it would be the extreme of injustice to penalize the entire automobile industry by holding void contracts of insurance because an occasional purchaser uses an insured automobile in the illegal transportation of intoxicating liquors. It would be opposed to the general welfare or public policy to so hold.

Respectfully submitted,

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